**IN THE HIGH COURT OF BOMBAY AT GOA**

**CRIMINAL APPEAL NO. 63 OF 2005**

Karekar Finance Pvt. Ltd.,
An incorporated Company,
Having registered office at
Karekar Building,
Feira Baixa, Mapusa, Goa. ... Appellant

versus

1. Shri M. N. Bashyam,
   Of full age,
   Having office at
   Bhashyam Chambers,
   Caranzalem, Goa.

2. State, through Public
   Prosecutor. ... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Mr. Ryan Menezes, Advocate for the Appellant.

Mr. Shivan Dessai, Advocate for the Respondent No.1.

**CORAM : N. A. BRITTO, J.**

**DATE : 22ND AUGUST, 2007.**

**JUDGMENT**

This is Complainant's appeal against the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881(Act, for short) by Order dated 28-4-2005 of the learned J.M.F.C., Mapusa.

2. The Complainant is a Finance Company and the accused is an architect by profession. The complaint was filed with the allegation that on 7-8-1997 the accused was given a loan of Rs.1,50,000/- repayable with interest at the rate of 24% per year on or before 7-8-1999 and in repayment of the said loan the accused had issued a cheque dated 25-4-2001 for Rs.4,17,274/- and the said cheque was presented on 8-9-2001 for encashment but was returned dishonoured by intimation dated 10-9-2001 from Centurion Bank Ltd., Panaji, whereupon the Complainant sent the statutory notice dated 17-9-2001 which the accused received on 19-9-2001 but did not comply with the same. The complaint was filed on 12-10-2001.

3. The case of the accused, as can be seen from his statement recorded under Section 313 of the Code of Criminal Procedure, 1973, is that the said cheque was issued by him in blank as collateral security. It was also the plea of the accused that the accused does not owe to the Complainant the amount represented by the said cheque.

4. The Complainant examined its Manager in support of the case. The accused did not step into the witness box. The learned trial Court came to the conclusion that the subject cheque was issued by the accused as a collateral security and was not issued in discharge of a legally enforceable debt and therefore the accused could not be convicted under Section 138 of the Act.

5. The learned Senior Counsel on behalf of the Complainant submits that the accused did not contest the statement of account of his loan produced on behalf of the Complainant. The learned Senior Counsel further submits that the accused had failed to step into the witness box and had taken inconsistent defences and as such was unable to rebut the presumption available to the Complainant in terms of Section 139 of the Act. The learned Senior Counsel contends that although the cheque given to the Complainant was dated 25-4-2001, the same was filled in with an amount of Rs.4,17,274/-which was certainly due to the Complainant, as per the said statement of account, prior to the said cheque was presented for payment. The learned Senior Counsel submits that even if the cheque was given as security the Complainant was entitled to complete it and present it for payment as the payment towards the loan was not forthcoming from the accused.

6. On the other hand, the learned Counsel on behalf of the accused, submits that the subject cheque for Rs.4,17,274/- is for an amount which is greater than the amount which was due to the Complainant on 25-4-2001 and therefore the accused could not be prosecuted for bouncing of the said cheque and in this context the learned Counsel has placed reliance on the decision of Madras High Court in the case of **Angu Parameshwari Textiles** v. **Sri Rajam and Co.** (Acq.D.C.C. 801) wherein the Madras High Court has stated that if the cheque is for an amount which is more than the amount of the debt due, Section 138 cannot be attracted. That was a case where the cheque given was for Rs.4,68,581/- and subsequently the accused had paid an amount of Rs.2,00,000/- by demand draft. The Complainant

did not return the said cheque of Rs.4,68,581/- and obtained a cheque for the balance amount of Rs.2,68,581/- but presented the said original cheque which was returned unpaid, and, in the aforesaid circumstances the High Court stated that if the cheque was for an amount more than the amount of the debt due, Section 138 could not be attracted. The learned Counsel further submits that filling of the cheque for an amount which was not due to the Complainant, as on the date of the cheque, amounts to an alteration of the cheque and that could not be done without the consent of the accused who had issued the cheque and in this context the learned Counsel has placed reliance on **Avon Organics Ltd., Hyd.** v. **Poineer Products Ltd., New Delhi and others** (2003(2) DCR 273) wherein the Andhra Pradesh High Court observed that whenever blank cheques are filled up and presented, a presumption can be drawn under Section 139 of the Act. It is a rebutable presumption. The question is whether the accused is able to rebut the presumption. The learned Judge concluded that the accused had rebutted the presumption in that case as the accused had not given his consent to fill up the cheque for a particular amount in figures and words and the date portion which amounts to alteration of the cheque and which cannot be done without the consent of the party who had issued the cheque. With respect, I may only state that this view of the Andhra Pradesh High Court runs counter to the view held in **Mrs. Shila @ Sudha Manjunath Vernekar** v. **Mr. Rayaba S. Dessai and another**(unreported decision of this Court dated 27-1-2005 in Criminal Revision Application No.29 of 2004), wherein it was held as under:-

> "From the decisions cited on behalf of both the parties and referred to hereinabove, it appears that there is preponderance of judicial opinion in favour of the proposition that when a cheque is issued duly signed by the drawer and the holder completes the same in other respects namely as regards the amount due and the date, the presumption would still be available to the complainant/holder unless the accused shows that the said particulars were filled in without the consent of the accused/drawer."
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> "In my view cases like this cannot be termed to be a case where there is a material alteration. Material alteration will presuppose a change of something which is there to something which was not there. In cases like this there is a tacit or implied consent by the drawer to fill in the details of the amount and date of the cheque".

7. The learned Counsel on behalf of the accused has also placed reliance on a decision of this Court in **Goa Handicrafts, Rural & Small Scale Industries Development Corporation Ltd. v. M/s. Samudra Ropes Pvt. Ltd. and Ors. (2005 ALL MR (Cri) 2643),** and submitted that the words 'debt' or 'liability' in Section 138 of the Act have got to be interpreted to mean the debt which existed on the date on which the alleged cheque was issued and, therefore, learned Counsel contends that the figure of Rs.4,17,274/- was not due to the Complainant as per the very statement produced by the Complainant on 25-4-2001. The said statement shows that what was due to the Complainant as on that date was less than Rs.3,84,330.00.

8. There is no serious dispute that the accused had taken a loan from the Complainant on 7-8-1997 in the sum of Rs.1,50,000/-. By letter dated 14-5-2001, the Complainant had demanded from the accused a sum of Rs.30,000/- together with interest accrued thereon and when the Complainant's Manager, was cross examined with reference to the said letter, he stated that the figure of Rs.30,000/- was mentioned by mistake and the figure ought to be Rs.3,00,000/-. However, it is pertinent to note that as per the statement of account of the accused produced by the Complainant, as on 8-5-2001, what was due to the Complainant was a sum of Rs. 3,84,330/- and, therefore, the Complainant's statement that it was a mistake in mentioning the figure of Rs.30,000/- in lieu of Rs.3,00,000/-, could not be accepted.

9. Complainant's Manager admitted that the accused had carried out interior work for their company to the tune of about Rs.5,00,000/- to Rs.7,00,000/-. It was suggested to him that the accused had brought some material for carrying out the said work, a suggestion which he denied. He stated that the charges of the Architect were paid and although he stated that he had record to show that the charges of the Architect were paid, he did not produce any such record. It was suggested to him that after adjusting the architectural charges of the accused only an amount of Rs.30,000/- was due and payable by the accused to the Complainant towards the loan, a suggestion which he denied. This denial was before the letter dated 14-5-2001, was shown to him. The said letter makes the case of the accused quite probable that the accused was liable to pay to the Complainant a sum of Rs.30,000/- only.

10. In further cross examination, the Complainant's Manager stated that while granting the loan, they take security. He stated that he did not remember whether the said cheque was handed over to him or anybody else in their company. He admitted that the cheque was not given in their office in his presence and also stated that he did not remember after how many months or years, the said cheque was given to him or to his company after obtaining the loan and next admitted that it was possible that the said cheque was given by the accused as collateral security for the loan. It follows from the aforesaid statements from the Complainant's Manager that the accused had proved by balance of probability that the said cheque was given by the accused to the Complainant by way of security. It also may be noted that the accused in his reply dated 3-10-2001 had made very clear to the Complainant that he did not owe the sum of Rs.4,17,274/- and that he had kept the said cheque signed in blank by way of security for the loan and interest. The same position he had reiterated by his letter dated 21-10-2001 and, inspite of that, the Complainant made no averment in the complaint as to what was the reply sent by the accused to the Complainant in answer to the statutory notice sent by the Complainant to the accused. This shows that it is the accused who was consistent in his plea and it is the Complainant who was vacillating in his stand.

11. The Apex Court in **M. S. Narayana Menon** v. **State of Kerala**((2006) 6 SCC 39), has stated that once the defence that the cheque was issued by way of security is accepted as probable, the cheque, therefore, cannot be held to have been issued in discharge of a debt and the same would not come within

the purview of Section 138 of the Act. Therefore, the Complainant could not have succeeded in his case.

12. As per the very statement produced by the Complainant, the accused did not owe to the Complainant the sum of Rs.4,68,581/- as on the date of cheque i. e. 25-4-2001. That was the amount due when the cheque was presented on 8-9-2001, as per statement. In any event, it must also be noted that assuming the cheque was given to the Complainant on 25-4-2001, as contended on behalf of the Complainant, the Complainant at the most, would have had implied authority to fill in the same with an amount which was due to the Complainant as on that date i. e. the date the cheque was given. In other words, the cheque could be filled in for an amount of existing liability or liability in presenti as on the date the cheque was issued and not a liability which would arise subsequently after accrued interest was added to it. From whatever angle one looks at the case of the Complainant, the Complainant cannot succeed.

13. In the light of the above, the conclusion arrived at by the learned trial Court cannot be faulted. There is no merit in this appeal and therefore, the same is hereby dismissed.

**N. A. BRITTO, J.**

**RD**